**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
| | ) | WC Docket No. 04-36 |
| IP-Enabled Services | ) | |

# COMMENTS OF TIME WARNER INC.


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## COMMENTS OF TIME WARNER INC.

Time Warner Inc. ("Time Warner") respectfully submits these comments in response to the *Notice of Proposed Rulemaking* in this proceeding regarding the appropriate regulatory treatment of "IP-enabled services."[1] Time Warner is the parent company of the Nation's second-largest cable operator, Time Warner Cable, and of the Nation's largest Internet Service Provider, America Online, Inc. ("AOL").[2] Both TWC and AOL currently offer subscribers services based on Voice over Internet Protocol ("VoIP") technology to subscribers. Thus, Time Warner has a vital interest in the regulatory future of IP telephony and the issues raised in the *NPRM*.

### Introduction and Summary

Because providers of VoIP service so obviously lack market power, regulation is for the most part unnecessary. That said, the unique and crucial role telephony plays in the lives of consumers justifies certain limited consumer protection, public safety, and social welfare measures. For now, such regulation should apply only to services that assign their

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[1] *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*NPRM*").

[2] In addition, Time Warner has business interests in three other areas: filmed entertainment, networks, and publishing.

subscribers NANP numbers and allow them to receive calls from and terminate calls to the PSTN.

The Commission may make VoIP providers in the proposed regulated category subject to federal requirements concerning E-911, CALEA, consumer protection, disability access, universal service contributions, and access charges. Conversely, such VoIP providers should be entitled to the same rights as circuit-switched CLECs, including the right to interconnect with incumbent LECs, to receive universal service subsidies, to have new customers port their existing telephone number, to obtain telephone numbers, to have subscribers' telephone numbers included in directory listings, and to have access to necessary databases, including E-911 databases.

Cable operators should be encouraged to provide VoIP services. In particular, the Commission should make clear that cable operators who provide VoIP service do not for that reason become subject to increased franchise fees or other exactions by local franchising authorities (at least not without a credit for franchise fees already paid for use of public rights-of-way). In addition, the Commission should make clear that VoIP is subject to the protections of Section 621(b)(3) of the Communications Act (which protects cable operators providing telecommunications services from interference), whether directly or by analogy. Also, the Commission can and should determine that cable operators providing VoIP service do not for that reason become subject to increased pole attachment fees.

The Commission would be well within its prerogatives if it classified VoIP service in our proposed regulated category as an "information service." Under that classification, the Commission could construct our proposed regulatory framework by exercising its ancillary

jurisdiction. If the Commission were to classify VoIP service in our proposed regulated category as a "telecommunications service," much of our proposed framework would fall into place automatically. In that case, however, the Commission should explicitly state, as it did in the *Internet Over Cable Declaratory Ruling*, that the unbundling requirements of *Computer II* do not apply. Whichever classification the Commission chooses, it should ensure regulatory certainty by making clear that, in the alternative, it reaches the same conclusions under the other classification.

To enable VoIP to prosper, the Commission should erect a framework much like that of Title VI, which permits regulation only insofar as expressly allowed. In that framework, the Commission should allow no regulation at the local level, and only limited regulation at the state level. In particular, the Commission should not permit states to apply the kind of economic regulation that is appropriate only for monopolist incumbents, which includes both rate regulation and unnecessary regulation of terms and conditions.

## Background

### A. Time Warner Cable.

Time Warner Cable is the Nation's second largest multiple system operator, serving nearly 11 million video subscribers and over 3 million broadband subscribers in 27 states.[3] In 2001, Time Warner Cable completed an upgrade of its systems to two-way capable, hybrid fiber-coaxial plant, at a cost of nearly five billion dollars. In May 2003, after several years of developing and testing VoIP technology, Time Warner Cable launched its "Digital

[3] *See Voice Over Internet Protocol (VoIP): Hearing Before the Senate Committee on Commerce, Science & Transp.* (Feb. 24, 2004) (testimony of Glenn A. Britt, Chairman & CEO, Time Warner Cable), *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=1065&wit_id=2990.

Phone" service — a telephony service based on VoIP technology that uses North American Numbering Plan ("NANP") numbers and interconnects with the public switched telephone network ("PSTN") — to residential customers in Portland, Maine.[4]

Today, Time Warner Cable provides Digital Phone service in its cable systems in Maine, New York, Texas, North Carolina, Kansas, Missouri, and Ohio. Time Warner Cable plans to provide service in the majority of the Time Warner Cable footprint by the end of this year.[5] Any home passed by Time Warner Cable's upgraded hybrid fiber-coaxial facilities will be able to subscribe to Digital Phone Service, whether it subscribes to cable modem service or not.

**B. AOL.**

AOL is the Nation's largest Internet Service Provider ("ISP"), serving approximately 24 million members with a unique mix of interactive services, messaging and content. In August 2003, AOL introduced the AOL®Talk feature into its AOL 9.0 Optimized software that allows instant messaging ("IM") users to speak to each other once an IM session has been established. A computer-to-computer application, AOL®Talk allows AOL users to extend invitations to talk to other AOL users through the IM interface using either the sound card, speakers and microphone installed on the user's computer or through a USB phone that is plugged into the user's computer. While sound quality can be improved if the user

[4] *Id.* Where we refer to "VoIP service" in this submission, we are referring simply to a service that uses VoIP technology — not necessarily to a service that, like Time Warner Cable's Digital Phone service, uses NANP numbers and interconnects with the PSTN.

[5] *Id.*

chooses to utilize a USB phone, AOL®Talk users understand that sound quality is likely to vary depending upon user equipment, Internet access connection speed and similar factors.

In contrast to traditional circuit-switched telephony, as well as other forms of VoIP, AOL®Talk permits voice communications only with AOL members signed on to the service using AOL 9.0 Optimized software. The AOL®Talk feature does not use NANP numbers and does not interconnect with the PSTN.

## Argument

## I. THE COMMISSION SHOULD DEFINE A NARROW CATEGORY OF VOIP SERVICES THAT WILL BECOME SUBJECT TO LIMITED REGULATION WHILE LEAVING OTHER SERVICES UNREGULATED.

The *NPRM* asks "how, if at all, we should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate."[6] In Time Warner's view, the questions of what services should be regulated, how they should be regulated, and who should regulate them answer themselves once the Commission resolves an antecedent issue: is regulation of IP-based voice services necessary at all, and, if so, why?

### A. It Is Appropriate To Apply Limited Regulation to Certain VoIP Services.

VoIP services will achieve the competition in residential telephony sought to be promoted by the Telecommunications Act of 1996.[7] Although they will do so in a way quite different than anticipated at the time of the statute's enactment, Congressional intent underlying the 1996 Act can guide the regulatory way: competitive entry by advanced,

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[6] *NPRM* ¶ 35.

[7] Pub. L. No. 104-104, 110 Stat. 56 (1996).

broadband-based, Internet-related technologies should be promoted through deregulation.[8] Because new VoIP services "are not characterized by . . . monopoly conditions,"[9] the heavy regulation that has traditionally characterized local telephony is simply unnecessary. Plainly, the "proliferation" of rival VoIP services "permit competitive developments in the marketplace to play the key role once played by regulation,"[10] and justify "fencing off IP platforms from economic regulation traditionally applied to legacy telecommunications services[.]"[11]

But this does not mean that particular kinds of VoIP services should be "beyond the reach of regulations designed to promote public safety and consumer protection (such as E911) or other important public policy concerns."[12] Traditionally, voice service has been regulated in part because of the unique and crucial role it plays in the lives of consumers, who rely on telephony to summon help in times of emergency and to stay in touch with the

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[8] *See* 47 U.S.C. § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public."); *id.* note, Telecommunications Act of 1996, § 706(a) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . methods that remove barriers to infrastructure investment."); *id.* § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . . ."); H.R. Conf. Rep. No. 104-458 at 1 (1996) (Act was intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

[9] *NPRM* ¶ 5.

[10] *Id.* ¶ 4.

[11] *Id.* ¶ 5.

[12] *Id.*

outside world at other times. To enable these crucial functions to be fulfilled, providers of circuit-switched telephony — whether incumbents or new rivals — have long been subject to various consumer-protection, public-safety, and social-welfare measures, including complaint procedures, E-911 requirements, and universal service rules. These "aspects of the existing regulatory framework . . . should continue to have relevance as communications migrate to IP-enabled services."[13]

As the *NPRM* correctly observes, the services that raise the most immediate concerns are those "that might be viewed as replacements for traditional voice telephony" — particularly services that so closely "resemble traditional wireline telephony" as to give rise to "end users' expectations" that the service functions and is regulated the same way.[14] At this time, Time Warner believes that those concerns are sufficiently acute to warrant regulation only in the case of services that closely resemble traditional telephony. For such services, the justification for limited regulation is strongest. For other services, some of the same justifications may apply, but not with equal force. For those services, the "established policy of minimal regulation of the Internet and the services provided over it" currently outweighs the justification for regulation.[15]

### B. The Commission Should Limit the Regulated Category to VoIP Services That Use NANP Numbers and That Exchange Traffic with the PSTN.

The *NPRM* seeks comment "regarding how, if it all, we should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited

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[13] *Id.*

[14] *Id.* ¶ 37.

[15] *Id.* ¶ 2.

to those cases in which they are appropriate." *NPRM* ¶ 35. The *NPRM* asks "whether it would be useful to divide IP-enabled services into discrete categories, and, if so, how we should define these categories." *Id.* As the Commission points out, to the extent VoIP services "resemble traditional wireline telephony," this resemblance "likely shape[s] end users' expectations regarding the service." *Id.* ¶ 37. Because legitimate consumer expectations with respect to voice service are entitled to protection, Time Warner believes that the Commission should define a subset of IP voice services that reasonably may be subjected to certain core regulatory requirements necessary for purposes of consumer protection, public safety, and social welfare.

Time Warner proposes that the category of VoIP services that may be subject to regulation should be limited to those services that: (1) assign their subscribers NANP numbers; and (2) allow subscribers to receive calls from and terminate calls to the PSTN. By limiting the regulated category in this way, the Commission will confine regulation to VoIP services that constitute potential replacements for traditional telephony — that is, to those services that present the strongest justification for regulation.[16] Moreover, this proposal creates a bright-line rule, which holds out administrative convenience to the Commission and regulatory certainty to industry participants.[17]

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[16] *See id.* ¶ 37 (referring to PSTN interconnection and use of NANP numbers as a "key distinction among VoIP services").

[17] *See, e.g., 2002 Regulatory Review — Review of the Commission's Broadcast Ownership Rules and the Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 82 (2003) ("bright line rules provide certainty to outcomes, conserve resources, reduce administrative delays, lower transaction costs, increase transparency of our process, and ensure consistency in decisions").

Limiting the regulated category this way is also consistent with the Commission's observations about the appropriate regulatory framework for VoIP services in its 1998 *Report to Congress*.[18] There, the Commission noted, without deciding, that regulation may be appropriate for services that allow the user "to originate or terminate Internet-based calls" on the PSTN and "allow[] the customer to call telephone numbers assigned in accordance with the North American Numbering Plan."[19] Time Warner's proposed limitation also reflects the *NPRM*'s "key distinction" between "VoIP services . . . that offer interconnection with the PSTN and/or utilize traditional NANPA-administered telephone numbers" and those that do not.[20] That distinction was crucial to the Commission's decision not to regulate pulver.com's Free World Dialup service as a telecommunications service.[21] For IP-based services that fall outside of the proposed regulated category, the Commission may properly take a wait-and-see

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[18] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) ("*Report to Congress*").

[19] *Report to Congress* ¶¶ 88, 89.

[20] *NPRM* ¶ 37.

[21] *See Petition for Declaratory Ruling That pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶ 2 n.3 (2004) ("*Free World Dialup Order*") ("we specifically decline to extend our classification holdings to the legal status of FWD to the extent it is involved in any way in communications that originate or terminate on the public switched telephone network"). Our proposed definition is also consistent with a policy paper that NCTA issued earlier this year. *See* NCTA, *Balancing Responsibilities and Rights: Facilities-Based VoIP Competition*, NCTA Policy Paper (Feb. 2004), *available at* http://www.ncta.com/Pdf_Files/WhitePapers/VoIPWhitePaper.pdf. The policy paper proposed that limited regulation apply to a VoIP service if "(1) it makes use of North American Numbering Plan ('NANP') resources; (2) it is capable of receiving calls from or terminating calls to the public switched telephone network ('PSTN') at one or both ends of the call; (3) it represents a possible replacement for POTS; and (4) it uses Internet Protocol transmission between the service provider and the end user customer, including use of an IP terminal adapter and/or IP-based telephone set." *Id.* at 4.

approach, during which the *status quo* should continue (*i.e.*, during which those services would remain unregulated).[22]

### C. The Commission Should Not Treat Facilities-Based VoIP Providers Differently from Non-Facilities-Based VoIP Providers.

Just as the Commission should be careful to confine the regulated category to those services with respect to which the justification for regulation is the most pressing, it should not adopt arbitrary distinctions among services that fall within the category. The *NPRM* hints at such distinctions when it seeks comment on whether "entities that provide multiple layers" should be regulated differently from other providers of IP-enabled services.[23] The Commission should treat providers of the same layer the same way, regardless of whether they also provide other layers.[24]

This conclusion flows naturally from the basic reason why some regulation of VoIP service is unobjectionable. As explained above, telephony's central role in modern life justifies some consumer-protection, public-safety, and social-welfare measures. Those measures can usefully be imposed only on the retailer of the actual voice service. For

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[22] *See NPRM* ¶ 35 ("[T]he great majority [of IP-enabled services], we expect, should remain unregulated.").

[23] *Id.* ¶ 37.

[24] Similarly, the Commission should not distinguish between providers who use their own networks to transport IP voice packets to their ultimate destination and those providers who use others' networks (*i.e.*, the "Internet") to transport those voice packets. Although these different approaches may have implications for the service quality and security offered to the end-user, the difference does not provide a basis for a regulatory distinction. *Cf. Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP telephony Services Are Exempt from Access Charges*, Order, WC Docket No. 02-361, FCC 04-97, ¶ 17 (rel. Apr. 21, 2004) ("*AT&T Order*") ("commenters . . . fail to explain why using the Internet, as opposed to a private IP network or some other type of network, is at all relevant to our analysis").

example, it would make no sense to attempt to protect customers of so-called "over the top" VoIP service (*i.e.*, services that ride over other firms' broadband facilities) by imposing complaint-proceeding rules on the providers of the underlying facilities. Likewise, 911 obligations with respect to voice services cannot be implemented by imposing duties on the provider of the underlying broadband service. Moreover, insofar as an "over the top" VoIP provider needs certain rights (say, interconnection rights), it is not helped if those rights are granted only to other entities. Insofar as facilities-based providers' control over facilities raises issues, they are logically distinct questions that are already the subject of separate proceedings.[25] They should be resolved therein.

## II. THE COMMISSION SHOULD APPLY A LIMITED SET OF REGULATIONS DESIGNED TO ADVANCE IMPORTANT PUBLIC INTEREST GOALS TO SERVICES WITHIN THE DEFINED CATEGORY.

The *NPRM* suggests, and Time Warner agrees, that, although there is no need to subject VoIP services — which are highly competitive — to regulation designed to curb abuse of market power,[26] certain other forms of regulation will continue to have relevance as

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[25] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Internet Over Cable Declaratory Ruling*").

[26] *See, e.g., NPRM* ¶ 74 (regulations "written to apply specifically to cases involving a monopoly service provider using its bottleneck facilities to provide services to a public that is without significant power to negotiate the rates, terms and conditions of those services" may not be appropriate in the context of VoIP services, "given that customers can often obtain these services from multiple, intermodal, facilities- and non-facilities-based service providers").

consumer telephony migrates to VoIP platforms.[27] The Commission seeks comment on "which particular regulatory requirements and entitlements" should apply to IP-based services.[28] As explained below, Time Warner believes that providers of VoIP service should be subject to the basic consumer protection, public safety, and social welfare requirements traditionally imposed on non-dominant providers of circuit-switched telephone service, though the Commission correctly notes that any "requirement must be tailored as narrowly as possible."[29] Meanwhile, VoIP providers should be entitled to the same basic protections to which federal law entitles circuit-switched local exchange carriers.

### A. The Commission Is Justified in Subjecting Providers of VoIP Services to Public Safety, Consumer Protection, and Social Welfare Requirements.

The *NPRM* identifies certain "aspects of the existing regulatory framework — including those provisions designed to ensure disability access, consumer protection, emergency 911 service, law enforcement access for authorized wiretapping purposes, [and] consumer privacy" as those that will "continue to have relevance as communications migrate to IP-enabled services."[30] Time Warner believes that the Commission has appropriately identified those requirements that advance important social policies, the need for which stems from the societal role of telephone service, independent of possible concerns about market power. In particular, Time Warner supports making the following requirements applicable to the proposed regulated category of VoIP providers:

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[27] *See id.* ¶ 36 ("[W]e seek ways to distinguish those regulations designed to respond to the dominance of centralized, monopoly-owned networks from those designed to protect public safety and other important consumer interests.").

[28] *Id.* ¶ 48.

[29] *Id.* ¶ 35.

[30] *Id.* ¶ 5.

*Enhanced 911.* As the *NPRM* notes, the Commission has identified four criteria for determining whether an entity should be subject to some form of E911 regulation: (1) the entity offers "real-time, two-way switched voice service" interconnected with the PSTN; (2) customers have a "reasonable expectation of access to 911 services"; (3) "the service competes with traditional CMRS or wireline local exchange service"; and (4) supporting 911 "is technically and operationally feasible."[31] These criteria derive from the Commission's ongoing proceeding regarding the implementation of enhanced 911 service.[32] Because the criteria dovetail with Time Warner's proposed definition of the category of VoIP services that may be subject to regulation, Time Warner believes that the Commission should make a preliminary determination in this proceeding that the VoIP services that fall within the regulated category are subject to 911 requirements. The Commission can address more detailed compliance issues in its ongoing E911 proceeding.

*CALEA.* The Commission is currently considering a petition filed by federal law enforcement agencies requesting that the Commission initiate a rulemaking in which it would consider making certain providers of VoIP services subject to the requirements of CALEA.[33] NCTA has filed comments supporting the issuance of a declaratory ruling that would bring within CALEA all VoIP providers that fall within the category of regulated services that

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[31] *Id.* ¶ 55.

[32] *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 25340, ¶¶ 18, 19 (2003).

[33] *See Comments Sought on CALEA Petition for Rulemaking*, Public Notice, 19 FCC Rcd 4691 (2004).

Time Warner has proposed here. Time Warner fully supports this position, and believes that the Commission should resolve CALEA-related issues in proceedings devoted to that subject.

*Consumer Protection.* The Commission invites comment on whether it is appropriate to extend various federal "consumer protections afforded in the Act to subscribers of VoIP or other IP-enabled services,"[34] including restrictions on the use of customer proprietary network information ("CPNI"),[35] prohibitions on "slamming,"[36] and "Truth-in-Billing" rules.[37] Time Warner believes that these federal requirements should apply to providers of VoIP services that fall within the proposed regulated category. As explained below, however, we believe that rules at the state level should be kept to a minimum.

*Disability Access.* In an ongoing proceeding, the Commission has already invited comment on the applicability of the disability access requirements of 47 U.S.C. §§ 255 and 251(a)(2) to "Internet telephony" services.[38] Time Warner supports a ruling by the Commission in this proceeding that VoIP services that meet the criteria outlined above are subject to disability access requirements. The Commission should incorporate relevant comments received in this proceeding into the *Disability Access* docket, in which it can resolve specific issues relating to implementation of the access requirements to VoIP services.

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[34] *NPRM* ¶ 71.

[35] *See* 47 U.S.C. § 222.

[36] *See id.* § 258.

[37] *See* 47 C.F.R. §§ 64.2400-64.2401.

[38] *See Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, ¶ 175 (1999).

*Universal Service.* Time Warner believes that providers of VoIP services that fall within the regulated category should be required to contribute to the federal universal service fund. Under the Commission's current contribution methodology, implementation of that obligation may raise certain issues.[39] In a separate docket, the Commission is examining potential reforms to the contribution methodology.[40] Time Warner believes that it would be appropriate for the Commission to announce the general principle that regulated VoIP services shall be subject to universal service requirements here, and to address the implementation of those requirements in the proceeding dedicated to that subject.

*Inter-Carrier Compensation.* The Commission seeks comment "on the extent to which access charges should apply to VoIP or other IP-enabled services."[41] The Commission correctly observes that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network," and that "the cost of the PSTN should be borne equitably among those who use it in similar ways."[42] One role of inter-carrier compensation regimes is to ensure that providers retain proper incentives to engage in ongoing facilities-based investment. Thus, the Commission may reasonably conclude that providers of VoIP services in the regulated category are required to pay access charges, so

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[39] For example, because most VoIP services use local and long-distance "all-you-can-eat" pricing, it is difficult to distinguish between intrastate and interstate revenues. *See NPRM* ¶ 64.

[40] *See Federal State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002).

[41] *NPRM* ¶ 61.

[42] *Id.*; *see also AT&T Order* ¶ 16 (providers of services that impose "burdens on the local exchange" should pay access charges).

long as the principle works both ways. The Commission should, moreover, redouble its efforts to reform the inter-carrier compensation regime to eliminate currently existing disparities and arbitrage opportunities.

### B. Regulated VoIP Services Should Be Entitled to the Same Basic Rights as Circuit-Switched LECs.

The Commission recognizes that it may be necessary to affirm that providers of VoIP services have certain regulatory "entitlements."[43] In order for VoIP services to compete effectively with traditional telephony services, providers of VoIP services should stand on the same regulatory footing as circuit-switched LECs. In particular, it is essential that the Commission ensure that VoIP providers have the right: (1) to interconnect with incumbent LECs;[44] (2) to receive universal service subsidies;[45] (3) to have new customers port their existing telephone numbers;[46] (4) to obtain telephone numbers;[47] (5) to have customers' telephone numbers included in incumbent LECs' directory listings;[48] and (6) to have access to

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[43] *NPRM* ¶ 48.

[44] *See* 47 U.S.C. § 251(c)(2).

[45] *See id.* §§ 214(e), 254(e).

[46] *See id.* § 251(b)(2). In addition, for business reasons, some VoIP providers, including Time Warner Cable, connect to the PSTN through circuit-switched CLECs. The Commission should make clear that, regardless of whether it classifies VoIP as a "telecommunications service" or an "information service," such VoIP providers are entitled to submit port requests, obtain numbers, and interact with incumbent LECs through their CLEC partner. Without these rights, VoIP providers simply cannot enter, and facilities-based residential competition will stall.

[47] *See id.* § 251(e); 47 C.F.R. § 51.219; *id.* § 52.1, *et seq.*

[48] *See* 47 C.F.R. § 51.219.

necessary databases, including E-911 databases. Where adjustments to existing rules are necessary, the Commission should make them.[49]

### C. VoIP Service Provided by Cable Operators Should Be Encouraged.

The Commission asks: "What effect, if any, does Title VI of the Act have on any potential regulation of cable-based IP-enabled services?"[50] Several aspects of cable-related regulation appear relevant to the provision of VoIP services by cable operators.

*Fees.* Because VoIP service plainly is not a cable service,[51] it follows that cable operators are not subject to franchise fees on revenues derived from such services. Section 622(b) of the Communications Act provides that local franchising authorities may levy franchise fees only on revenue derived from the provision of "cable services."[52] As the

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[49] For example, current universal-service rules provide that competitive providers may not receive funding unless they promise to provide supported services throughout the "service area for which [their eligible telecommunications carrier] designation is received." *Id.* § 54.201(d). These "service areas" generally conform to traditional, PSTN-related service areas and boundaries, which tend not to correspond to the service areas of cable operators. Insofar as cable operators cannot provide facilities-based service to end users outside their service areas, the "service area" requirement has the effect of making cable operators ineligible for funding unless they serve households not passed by their own facilities through unbundled network elements or resale. There is no good basis in policy for this obstacle: just as incumbent LECs need not provide service outside their services areas as a condition for funding, neither should cable operators be required to do so.

[50] *NPRM* ¶ 70.

[51] Although we discuss the classification of VoIP services in more detail below, it is clear that no amount of linguistic gymnastics could persuasively support the conclusion that a service enabling two-way, real-time voice communication is "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service." 47 U.S.C. § 522(6).

[52] *Id.* § 542(b) ("For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services.").

Commission accordingly held in the *Internet Over Cable Declaratory Ruling*, revenues from cable modem service (also a non-cable service) fall outside of the permissible fee base established by Section 622(b).[53] The same result follows with respect to VoIP service, and the Commission should reaffirm this conclusion.

Some local franchising authorities have adopted ordinances that are phrased to require payments from all users of public rights-of-way, and have taken the position that those ordinances are generally applicable and therefore not subject to the restrictions of Section 622. Even assuming that such ordinances would not be "franchise fees" for purposes of Section 622, cable operators already pay for their use of public rights-of-way through franchise fees. The Commission should make clear that, at a minimum, cable operators are entitled to a credit for the franchise fees that they already pay for that purpose, lest they be required to pay twice for the same access to public rights-of-way. If the Commission classifies VoIP service as a "telecommunications service," that result follows naturally from Section 253.[54] If the Commission classifies VoIP service as an "information service," it should adopt an analogous rule as an exercise of its ancillary powers.[55]

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[53] *See Internet Over Cable Declaratory Ruling* ¶ 105 ("Given that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined."). Three district courts have reached the same conclusion. *See Time Warner Cable v. City of Rochester*, No. 03 Civ. 6257 (DGL) (W.D.N.Y. Dec. 22, 2003); *City of Chicago v. AT&T Broadband, Inc.*, No. 02 C 7517, 2003 WL 22057905 (N.D. Ill. Sept. 4, 2003); *Parish of Jefferson v. Cox Communications Louisiana, LLC*, No. Civ. A 02-3344, 2003 WL 21634440 (E.D. La. July 3, 2003).

[54] *See, e.g., City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176, 1177 (9th Cir. 2001) (limiting fees imposed on telecommunications carriers to the cost of providing access), *cert. denied*, 534 U.S. 1079 (2002); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp.2d 1081, 1100 (N.D. Cal. 2001) (same).

[55] *See infra*, Part III.

*State and Local Entry Barriers.* Section 621(b)(3) of the Communications Act contains several provisions designed to prevent local franchising authorities from interfering with a cable operator's provision of telecommunications service, among which is a provision specifically prohibiting local franchising authorities from requiring cable operators to obtain an additional franchise.[56] Admittedly, these protections by their terms apply to the provision of "telecommunications service." But, no matter whether the Commission ultimately determines that the VoIP services in the regulated category should be classified as "telecommunications services" or "information services," the Commission should ensure that cable operators providing VoIP services do not face a layer of regulation to which cable operators providing circuit-switched voice services are not subject.

*Pole Attachments.* Section 224 of the Communications Act governs the maximum rates utilities may charge cable operators for pole attachments.[57] Section 224 creates two explicit rate categories: Subsection (d) envisions one rate for "cable service," and Subsection (e) calls for a higher rate for "telecommunications service." Before the Commission sorted out the regulatory classification of cable-modem service, it held that, for services that do not clearly fall within either explicit rate category, there is a third — implicit — rate category, in which the Commission has discretion to set applicable rates.[58]

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[56] 47 U.S.C. § 541(b)(3)(A)(i); *see* H.R. Rep. 104-204, Part I, at 93 ("The intent of [Section 621(b)(3)] is to ensure that regulation of telecommunications services, which traditionally has been regulated at the Federal and State level, remains a Federal and State regulatory activity.").

[57] *Id.* § 224.

[58] *See Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, ¶¶ 30-31 (1998).

The Commission held that this third category applies when a cable operator "commingles" cable service with cable-modem service — that is, when it provides a "cable service" with a service that (at the time) might constitute either a "telecommunications service" or an "information service," mixed together and transmitted through the same wire or optical fiber.[59] Not wanting to deter cable operators from providing a new and innovative service, the Commission held that the rate applicable to such commingled service should be set at the same level as the rate of Section 224(d).[60]

In *National Cable & Telecommunications Association v. Gulf Power*, the United States Supreme Court held that the statute permits this approach.[61] The Court explained that, even if the Commission would eventually determine that cable modem service considered by itself constitutes a "telecommunications service," the Commission would still be well within its prerogatives to apply the Section 224(d) rate to commingled cable/Internet service:

> Congress may well have chosen to define a "just and reasonable" rate for pure cable television service, yet declined to produce a prospective formula *for commingled cable service*. The latter might be expected to evolve in directions Congress knew it could not anticipate. . . . It might have been thought prudent to provide set formulas for telecommunications service and "solely cable service," and to leave unmodified the FCC's customary discretion in calculating a "just and reasonable" rate *for commingled services*.[62]

Besides, the Court noted, it makes little sense to punish cable operators through increased pole attachment rates for offering innovative services. According to the Court, the

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[59] *Id.* ¶¶ 32-35.

[60] *See id.* ¶ 34.

[61] 534 U.S. 327 (2002).

[62] *Id.* at 338-39 (emphasis added).

congressional policy in favor of accelerating deployment of new services "underscores the reasonableness of the FCC's interpretation."[63]

The Commission should apply the same reasoning to VoIP. Whether VoIP constitutes an "information service" or a "telecommunications service," commingled cable/cable-modem/VoIP service does not unambiguously fall into the rate category of either Section 224(d) or Section 224(e). The Commission therefore has discretion to set a reasonable rate regardless of the restrictions imposed by those provisions. The Commission should preserve the *status quo* by holding that attachments used to provide commingled cable/VoIP service are subject to the existing rate for cable service.

Any other reading would stifle emerging facilities-based residential telephone competition: cable operators providing facilities-based residential voice competition would be punished for their efforts with higher pole attachment rates. Besides, there is no basis in policy for increasing the rates of cable operators provide VoIP service: because such service requires no additional outside plant, there is no additional burden on pole owners.

## III. THE COMMISSION CAN ESTABLISH THE PROPER REGULATORY FRAMEWORK REGARDLESS OF WHETHER IT CLASSIFIES VOIP AS AN "INFORMATION SERVICE" OR A "TELECOMMUNICATIONS SERVICE."

The Commission invites comment on "the appropriate statutory classification for each category of IP-enabled services identified by commenters."[64] There are two relevant possibilities: "information service" and "telecommunications service."[65] The *NPRM*

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[63] *Id.*

[64] *NPRM* ¶ 43.

[65] *See id.* ¶ 43. As explained above, VoIP cannot be made to fit the statutory definition of "cable service."

instructs "commenters [to] consider what policy consequences flow from a particular statutory definition," and invites "pragmatic proposals that account for the technical, market, or other features that characterize IP-enabled services and that address the interrelationship between those features, the statutory text, and our policy goals."[66] We believe that the Commission can achieve its policy goals under either classification.

### A. The Commission Can Impose the Proper Regulatory Regime Under an "Information Service" Classification.

The Commission could reasonably conclude that regulated VoIP services constitute "information services." Many, perhaps most, VoIP services that fall within the proposed regulated category involve protocol conversion, require special CPE, and offer enhanced functionality, including sophisticated call-management capabilities. IP technology further allows VoIP providers to integrate video conferencing, document sharing, and other functions. These enhanced functions constitute "computing capabilities," on whose presence the Commission relied in classifying pulver.com's Free World Dialup service as an information service.[67] Although the VoIP services in our proposed regulated category are different from pulver.com's Free World Dialup service (specifically, they provide PSTN interconnection and use NANP numbers), it is not apparent why those functions should disqualify them from classification as an information service.

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[66] *Id.* ¶ 42.

[67] *Free World Dialup Order* ¶ 11; *contra AT&T Order* ¶ 15 (service was "telecommunications service" where customers received "no enhanced functionality by using the service").

Although information services are generally unregulated,[68] the approach we advocate could be achieved under that classification. Because the VoIP services that fall within our proposed category, by definition, are potential substitutes for circuit-switched telephony, the Commission may exercise its "ancillary jurisdiction" under Title I to impose regulation reasonably necessary to complement the regulatory landscape that the Commission has developed for traditional telephony.[69]

### B. The Commission Can Impose the Proper Regulatory Regime Under a "Telecommunications Service" Classification.

Likewise, the Commission could readily achieve its objectives under a "telecommunications service" classification. Much of our proposed regulatory framework would fall into place automatically. Providers of "telecommunications service" would automatically come within the scope of applicable provisions relating to CALEA,[70] 911 and E911,[71] disability access,[72] protection of customer privacy,[73] slamming,[74] universal service,[75]

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[68] *See id.* ¶ 15 ("We determine, consistent with our precedent regarding information services, that FWD is an unregulated information service[.]").

[69] *See NPRM* ¶ 49 n.156 (citing *United States v. Midwest Video Corp.*, 406 U.S. 649, 661 (1972) (Commission has authority under Title I to regulate a service that "threatened to deprive the public of the various benefits of [a] system . . . that the Commission was charged with developing and overseeing") (internal citations omitted).

[70] *See* 47 U.S.C. § 1002(a) (imposing assistance capability requirements upon "a telecommunications carrier"). Although CALEA defines "telecommunications carrier" more broadly than the Communications Act, *see id.* § 1001(8), it is clear that entities that meet the Communications Act definition would also fall within the CALEA definition.

[71] *See* 47 C.F.R. § 64.3001.

[72] *See* 47 U.S.C. § 225(c) ("[e]ach common carrier providing telephone voice transmission services shall . . . provide . . . telecommunications relay services"); *id.* § 255(c) ("A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.").

[73] *Id.* § 222(a) ("Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, . . . customers[.]").

and inter-carrier compensation.[76] In addition, the Act would authorize the Commission to protect VoIP providers from undue state and local interference,[77] and VoIP providers would be entitled to various necessary rights.[78] Meanwhile, to the extent that classification of VoIP as a telecommunications service implicates any regulation that the Commission deems unnecessary, the Act entitles the Commission to forbear.[79]

If the Commission settles on a "telecommunications service" classification for VoIP, it should reject, just as it did in the *Internet Over Cable Declaratory Ruling*, the argument

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[74] *Id.* § 258(a) ("No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telecommunications exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.").

[75] *Id.* § 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.").

[76] *Id.* § 251(b)(5) (imposing on all "local exchange carriers" the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications"); 47 C.F.R. § 69.5(b) ("Carrier's carrier charges shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.").

[77] *Id.* § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."); *id.* § 541(b)(3)(B) ("A franchising authority may not impose any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of telecommunications service by a cable operator or an affiliate thereof.").

[78] *See id.* § 251(c)(2), § 251(e), § 251(b)(2).

[79] *See* 47 U.S.C. § 160(a). The Commission has already determined that non-dominant LECs are not required to obtain a federal certificate or file federal tariffs. *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Report and Order in CC Docket No. 97-11, Second Memorandum Opinion and Order in AAD File No. 98-43, 14 FCC Rcd 11364, ¶ 2 (1999); *Hyperion Telecommunications, Inc.*, Memorandum Opinion and Notice of Proposed Rulemaking, 12 FCC Rcd 8576, ¶¶ 21-32 (1997).

"that *Computer II* would require any cable operator providing telephone service to unbundle the underlying transmission capacity of its cable modem service and make it available to other information service providers."[80] As the Commission there noted, the requirements of *Computer II* apply only to "traditional wireline services and facilities," not to "cable facilities."[81] The Commission in the *Internet Over Cable Declaratory Ruling* determined that, even if the requirements of *Computer II* did apply only to cable facilities, it would grant cable operators providing telephone service a conditional waiver lest "such cable operators would stop offering telephony."[82] It should do likewise here.

### C. If the Commission Decides To Classify VoIP Service as an Information Service, It Should Make Clear That, Under a Telecommunications Service Classification, It Would Impose the Same Regime — and Vice Versa.

As shown above, the Commission can craft the proper regulatory regime under either an "information service" or a "telecommunications service" classification. Thus, there may be no need to choose between the two: the Commission could simply decide that, however VoIP services are classified, the same regulatory regime applies. If the Commission does decide to favor one of the two approaches, it may be prudent to determine in advance that, in the event the favored classification does not pass muster on review, it reaches the same conclusions under the alternative classification. By doing so, the Commission may be able to avoid regulatory uncertainty.

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[80] *Internet Over Cable Declaratory Ruling* ¶ 44.

[81] *Id.*

[82] *Id.* ¶ 47.

## IV. WITH RESPECT TO REGULATED VOIP SERVICE, THE COMMISSION SHOULD ALLOW ONLY LIMITED NON-FEDERAL REGULATION.

In the *NPRM*, the Commission invites comment on "the appropriate basis or bases for asserting federal jurisdiction over the various categories of IP-enabled services,"[83] and asks "whether, and on what grounds, one or more classes of IP-enabled service should be deemed subject to *exclusive* federal jurisdiction."[84]

For VoIP to prosper, regulation must be predictable and nationally uniform. Having fifty potentially inconsistent and changing sets of regulations at the state level might hamper entry to the point of stifling it.[85] As difficult as it would be to comply with 50 different regulatory regimes, it would be impossible to comply with thousands of different local regimes. Thus, the Commission should erect a framework much like that of Title VI, which permits non-federal regulation only insofar as expressly allowed. Only state regulation that is expressly permitted should be allowed, and regulation at the local-franchising-authority level should not be permitted at all.

Although state regulators can perform a valuable supporting role within the framework that we propose, the Commission should not permit state commissions to apply the kind of economic regulation that is appropriate only for monopolist incumbents. Clearly, there is no place for rate regulation: VoIP providers have no market power. Although some regulation of terms and conditions may be unobjectionable, many existing state rules that at

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[83] *NPRM* ¶ 40.

[84] *Id.* ¶ 41.

[85] *Cf. Free World Dialup Order* ¶ 25 ("[T]he Internet enables individuals and small providers, such as Pulver, to reach a global market simply by attaching a server to the Internet; requiring Pulver to submit to more than 50 different regulatory regimes as soon as it did so would eliminate this fundamental advantage of IP-based communication[.]").

first glance may appear to constitute harmless "consumer protection" in fact antedate the advent of competition and in substance constitute "regulations designed to respond to the dominance of centralized, monopoly-owned networks[.]"[86] Such regulations are unnecessary in a competitive industry in which consumers may choose among several providers and may switch back and forth freely among them. Moreover, such rules erect barriers to entry and impose unnecessary costs that outweigh whatever consumer benefits they may bring. The Commission should make clear that such rules have no place in its federal framework.

The Communications Act provides the Commission with ample jurisdictional bases for erecting the federal framework here proposed, quite apart from the two bases on which the Commission relied in the *Free World Dialup Order*.[87] If the Commission determines that VoIP constitutes an "information service" subject to regulation under Title I, it may preempt *any* non-federal regulation that it views as hampering the achievement of its policy goals.[88]

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[86] *NPRM* ¶ 36. In particular, some states have rules that require providers to offer to customers in arrears on their payments deferred payment plans; rules that require bills to be laid out in a certain way; rules that require payments to be allocated in a certain way; rules that regulate installation intervals; rules that require the provision of "local only" service; rules that require the state commission's approval prior to any issuance of securities of not only the entity providing service but also all its parents and affiliates; and service quality and reporting rules, many of which are difficult to apply to IP-based platforms.

[87] *See Free World Dialup Order* ¶ 21 ("end-to-end analysis" is "unhelpful"); *id.* ¶ 22 ("mixed use" doctrine).

[88] *See* 47 U.S.C. §§ 151, 152(a), 154(i). In particular, Section 2(b) is no obstacle: that provision does not apply to information services provided by non-common carriers. *See id.* § 152(b) ("nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio *of any carrier*") (emphasis added); *id.* § 153(10) (indicating that "carrier" has the same meaning as "common carrier"); *California v. FCC,* 905 F.2d 1217, 1240 (9th Cir. 1990) ("The plain meaning of the language 'of any carrier' is that the statute applies to communications services provided by common carriers such as AT&T and the BOCs as distinguished from communications services provided by non-common carriers such as IBM. Thus, the

If the Commission determines that VoIP constitutes a "telecommunications service," it may preempt state and local regulation that "may . . . have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[89] Given the strong need for a nationally uniform regulatory structure, unduly extensive non-federal regulation plainly has "the effect of prohibiting the ability" of VoIP providers to "provide . . . telecommunications service."[90]

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distinction made by the statute is between providers of communications services, *i.e.*, between carriers and non-carriers."); *NARUC v. FCC*, 533 F.2d 601, 607 (D.C. Cir. 1976) (because Section 152(b) applies only to "*intra* state *common carrier* operations," court viewed the provision as an obstacle to preemption of intrastate communications by cable operators only insofar as the communication service at issue itself was provided on a common carrier basis) (emphasis in original); *NARUC v. FCC*, 525 F.2d 630, 647 (D.C. Cir. 1976) ("§ 152(b) only has application to common carriers"); Peter Huber, Michael Kellogg & John Thorne, *Federal Telecommunications Law* 1094 (1999) ("under the Commission's watchful eye, state regulation of information services has not developed").

[89] 47 U.S.C. § 253(a); *see Public Utility Commission of Texas*, 13 FCC Rcd 3460, ¶ 81 (1997) (preempting state-law requirements whether their "economic impact" was "great enough to have the effect of prohibiting entities subject to these requirements from providing competitive local exchange service"). Section 253 by its terms empowers the Commission to preempt state regulation of intrastate communications. Thus, Section 2(b)'s prohibition on "constru[ing]" any provision of the Communications Act "to apply or to give the Commission jurisdiction with respect to" regulation of intrastate communications has no force with respect to Section 253. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999) (Section 2(b) inapplicable where Act "*explicitly* gives the FCC jurisdiction" with respect to intrastate communications).

[90] Because undue state and local regulation would likely stifle VoIP entry, the Commission could reach the same result under the so-called "impossibility" exception to Section 2(b). *See, e.g., NARUC* v. *FCC,* 880 F.2d 422, 429 (D.C. Cir. 1989) (Commission may preempt state regulation of intrastate communications that would "negat[e] the exercise by the FCC of its own lawful authority over interstate communication").

## Conclusion

For the reasons set forth above, the Commission should now define a narrow category of VoIP services subject to regulation (consisting of those services that use NANP resources and interconnect with the PSTN). The Commission should make applicable to the services that fall within the specified category a short list of regulatory requirements and entitlements designed to promote important public interest goals and to encourage competition in local telephony.

Respectfully submitted,

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